
In the United States
Circuit Court of Appeals
For the Ninth Circuit.

13

RALPH MURPHY and DONALD GALLAHER,
Appellants,

vs.

WARNER BROS. PICTURES, INC., a corporation,
Appellee.

APPELLANTS' CLOSING BRIEF.

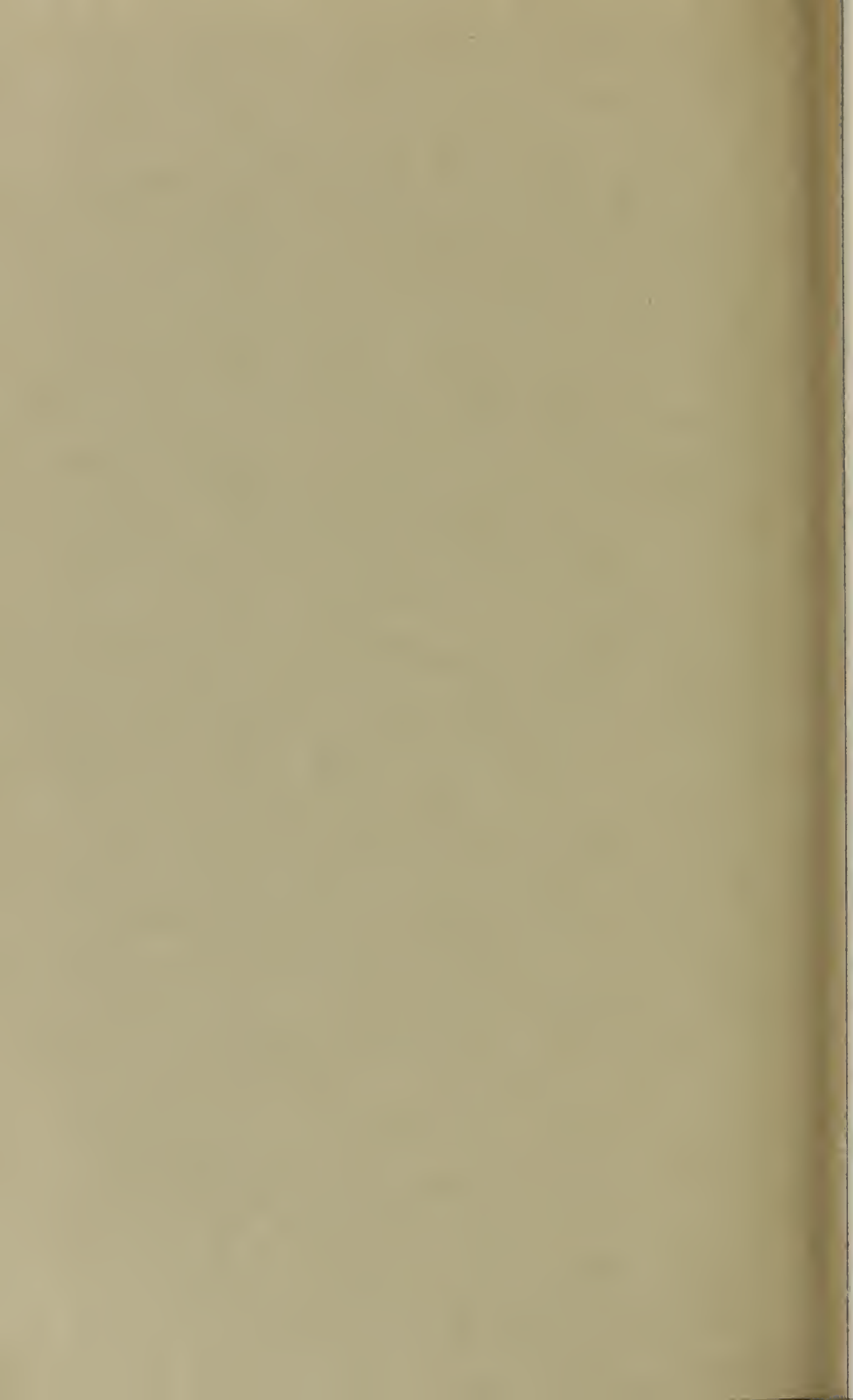
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APPELLANTS' CLOSING BRIEF.

The Ultimate Question on Appeal Is the Lower Court's
Error in Granting a Summary Judgment Without
a Trial Upon Controlling Issues of Fact.

"Appellee's Brief" has significantly departed from appellee's moving grounds of its motion for summary judgment. [Rec. pp. 61-64.] Both old and new grounds are untenable.

The first ground stated by appellee in its motion was that there was a "specific" grant of talking or dialogue rights in the play "Sh—The Octopus." [Rec. p. 62.] This has been shifted to arguments about so-called "internal evidence" (Br. p. 18); and claims that the particular trade customs and trade usages are "illogical." (Br.

p. 19.) These new contentions are as fallacious as the first. (*Infra*, Point IB, pp. 9-15.)

The second ground of appellee's motion, that the contract was interpreted by duly authorized agents of the parties [Rec. p. 63], is now wholly abandoned, presumably because appellee's counsel must now be satisfied that the hearsay declarations of former agents made long after the completion of the transaction are not provable against the former principal. It is apparent that appellee is following the maxim that "the less said the better" for the reason that the correspondence had by its predecessor-in-interest with appellants' ex-agent plainly shows that the purchaser recognized in the contract prepared by it both uncertainty and ambiguity which required "coverage." [See Rec. pp. 60-61.]

The final ground of appellee's motion contended that the terms of the contract "have been judicially interpreted by the laws of the State of New York, as conveying the talking as well as the silent motion picture rights—principally the case of *L. C. Page & Co. v. Fox Film Corp.* (1936), 83 F. (2d) 196. . . ." [Rec. p. 63.] The case cited is *not* a judicial interpretation of the laws of the State of New York, but refuses to follow the decision of the New York Court of Appeals in *Kirk LaShelle v. Armstrong*, 263 N. Y. 79.

Appellee, in its present brief, departs from the ground stated, by now contending that the *Page* case determined "either the law of New York *or* of the United States" and *if* there is a conflict "*this court will follow the laws of the United States, as reflected in the Page case, rather than what is asserted to be the laws of the State of New York as evidenced by the Kirk LaShelle case.*" (See App. Br. p. 13.)

This is clearly an erroneous conception of the express provision in the contract and of what law or judicial decisions govern interpretation of contracts. The true rule, as we will hereafter show (*infra*, Point IA, pp. 4-9), is that the laws of the United States govern copyright privileges and remedies, whereas the laws of the State of New York govern the provisions of contracts made within the State of New York.

Appellee's new contention (not included in its motion for summary judgment), as to the so-called generic nature of the trade term "sound," raises a question which even appellee does not claim has been judicially decided. As to the peculiar trade meaning of this trade term "sound" in April of 1928 as distinguished from the trade term "dialogue," it is apparent that the particular trade usages and customs pleaded by appellants (of which the summary judgment prevented proof) are of the utmost importance to determine what the grant in 1928 was intended to and did include; particularly in view of the decisions of the courts of New York State hereinafter referred to. (*Infra*, Points IA and II, pp. 4 and 15.)

Appellee thus evades or fails to answer substantially every point raised in our opening brief; and finally attempts to make capital of the fact that the contract here involved was "executed in 1928 and this action was commenced approximately nine years later." (Br. p. 35.) The defense of laches is not available to appellee nor was it a ground upon which appellee moved for summary judgment for the quite apparent reason that appellee's talking motion picture photoplay was not produced until the year 1937 and this action was commenced almost immediately after the cause of action was created by appellee's unauthorized conduct.

REPLY TO APPELLEE'S POINT I.

- A. The Grant of "Exclusive Motion Picture Rights" Has Never Been Judicially Construed by the Courts of New York State as Including "Talking" or "Dialogue" Rights—and the Contract Here in Question Does Not "Specifically" nor "Plainly" nor "Unambiguously" Grant "Talking" or "Dialogue" Rights in Appellants' Play.

In our opening brief (pp. 9-12) we pointed out that the first ground for appellee's motion for summary judgment was that the contract dated April 30, 1928,

"by its terms specifically grants on the part of the plaintiffs the right . . . to record spoken words and dialogue in synchronism or timed relation with the photographing of any such motion picture." [Rec. p. 62.]

If the contract here "specifically" granted the rights mentioned above, appellee would be correct in stating under Point I of its brief that there had been a judicial construction of such language. *Macloon v. Vitagraph* (2d Cir.), 30 Fed. (2d) 634, construes such a specific grant. On May 4, 1928, the authors of the play "The Desert Song" sold to Warner Bros. motion picture rights, together with the "rights to record the *words* and music therein for reproduction in synchronism or timed relation with the motion picture," and expressly warranted that they had not conveyed either the motion picture rights *nor* the rights "to record and reproduce mechanically the *words*, music and theme of the play." (30 F. (2d) 635—2d col.)

Such language does *not* appear in the instant contract either in the granting or warranty clauses. Nor does the

case of *L. C. Page & Co. v. Fox Film Corp.*, 83 Fed. (2d) 196, purport to construe any such language. The only phraseology actually construed in the *Page* case was the grant of “exclusive moving picture rights”—and the judicial construction of such clause was admitted by such federal court to be “opposed” to the decision of the New York Court of Appeals in *Kirk LaShelle v. Armstrong*, 263 N. Y. 79 (see 83 Fed. (2d) at p. 199).

In the *Page* case the jurisdiction of the Federal Court was invoked solely upon the ground of diversity of citizenship and in the absence of any controlling decision by the courts of Massachusetts (in which state the *Page* contract was executed) the Federal Court was free to depart from the rule laid down by the courts of New York State, applicable to contracts made in New York State.

At the time appellee moved for summary judgment, appellee fully realized the burden of establishing a favorable construction of its contract by the courts of New York State. Consequently appellee’s final ground contained in its motion for Summary Judgment [ground 6, Rec. p. 63] cited the *Page* case as a judicial interpretation by the laws of the State of New York.

In its present brief appellee is forced to admit that the *Page* case is *not* a judicial interpretation by the laws (or courts) of the State of New York but appellee takes refuge in the contention that “the *Page* case and the case at bar are actions in the federal court for infringement of copyright” and “if the *Kirk LaShelle* case therefore establishes the law of New York it is in connection with a law which is not material herein.” (App. Br. p. 15.) Appellee answers its new contention, however, when elsewhere in its brief it *admits* that in the instant case the

question “is *not* whether the work of the appellants has been copied and so infringed but whether the usage of such work by the appellee *under the terms of the contract in question* was authorized thereby” (Br. p. 8); appellee flatly stating in the conclusion to its brief that “the issue is simply one of construction of that contract.” (Br. p. 37.)

Having reached this definite conclusion, appellee inconsistently departs therefrom to assert with respect to the applicable decisions that if there is a conflict between the state laws (courts) of New York and the laws (courts) of the United States (App. Br. p. 13)

“This court will follow the laws of the United States as reflected in the *Page* case, rather than what is asserted to be the laws of the State of New York as evidenced by the *Kirk LaShelle* case.”

The well settled law of the federal courts is to the contrary. This is especially so since the decision in the *Erie Railroad Co. v. Tompkins*, 82 L. Ed. 1188.

Our own Circuit Court of Appeals holds, in cases involving interpretation of contracts, that federal courts must adopt the construction placed on similar contracts by legislatures and courts of states where the contracts are executed. (*Douglas v. Thurston County* (9th Cir.), 86 F. (2d) 899.) Interpretation of a contract is according to the state law of the state where the contract is made. (*Gray v. Western Borax Co.* (9th Cir.), 99 Fed. (2d) 239-242.)

Appellee’s final contention with respect to “judicial interpretation” is still based upon the *Page* case and involves an elaborate argument that the grant of motion

picture rights must be considered as a "genus," such "genus of necessity being inclusive of all species." (Br. p. 6.) The relevant portion of the *Page* decision quoted by appellee as determinative here follows:

"The mere fact that the species 'talkies' may have been unknown and not within the contemplation of the parties in their description of the generic 'moving pictures' does not prevent the latter from comprehending the former." (Br. p. 11.)

This decision is squarely contrary to the decision of the New York Court of Appeals in *Kirk LaShelle v. Armstrong*, 263 N. Y. 79, 188 N. E. 163, where that court of last resort states at page 85:

"Since 'talkies' were unknown at the time when the contract was entered into, it cannot be said that 'talkie' rights were within the contemplation of the parties either as a subject for the transfer of an interest therein to appellant or as included in the motion picture rights specifically excepted."

Regardless of this direct conflict with the *Page* case the New York courts have expressly held in other cases that motion picture rights are *not* a genus of which "the audible speaking of lines" is merely a species. (See *Cinema Corp. of America v. DeMille*, 267 N. Y. S. 327, 149 Misc. 358, affirmed in 267 N. Y. S. 959.) On the contrary, "the audible reproduction of words" has been expressly held by the New York courts to be a species of "dramatic" rights; and in the *DeMille* case the court held "talking" or "dialogue" rights to be "formerly inseparable from the dramatic rights," stating (267 N. Y. S. 327):

"Motion pictures when first presented in silent form were a new art. They lacked the one essential of stage plays performed by living actors in the pres-

ence of an audience—the audible speaking of lines—and so it was that the silent motion picture rights were recognized as something separate and apart from what had always been known as dramatic rights. However, the talking moving picture combines the pictorial element of the old silent motion pictures with the new element which was formerly inseparable from the dramatic rights, viz., the audible reproduction of words.”

If the contract here involved had divested the owners of all property and rights in the story including “dramatic rights”, etc., as in the *DeMille* case, then if no specific grant had been made of the right to reproduce spoken words or dialogue of the play, there might have followed as a necessary implication from the grant of the *combined* dramatic rights and moving picture rights, the right to produce a talking motion picture. But there is no parallel in the facts of the instant case with the *DeMille* case, *supra*. By the contract in this suit no “dramatic rights” were granted, rescinded or waived. Only the “title and theme of the writings” are mentioned in (1) (a) of the contract [Rec. p. 13] the right to use lines or excerpts from said writings for the title and/or subtitles and or text of said motion pictures in (1) (e) of the contract, and the right to use in advertising, excerpts, summaries, and novelizations in (1) (f). [Rec. p. 15.]

If the courts of New York state have made any decision upon the matter of what rights constitute a “genus” and what rights constitute a “species”, the *DeMille* case is squarely authority for the proposition that “talking” or “dialogue” rights are a species of the genus dramatic rights and in any event constitute a different genus than the genus motion picture rights.

Certain it is that the use of speech and dialogue within a theater whether on the screen or on the stage, employs the same combination of both visual and auditory appeal which come far closer to the portrayal of the so-called dramatic art than to the so-called art of motion pictures. Furthermore, the *LaShelle* case, 263 N. Y. 79, expressly holds that a sale of "talking" rights is a matter which affects the title to the dramatic rights.

Further argument on this point is unnecessary. Suffice it to say, that the *Page* case colors appellee's contentions but is in conflict with the decisions of the New York courts, which latter are determinative and controlling here.

B. The Intention of the Parties Must Be Ascertained From All of the Surrounding Facts and Circumstances, Including the Trade Customs and Usages Existing at the Time and in the State Where the Contract Was Made. Appellee Cannot Enlarge the Actual Grant by an Argument That "Appellants' Cataloging of Rights" (in the Pleadings and Affidavits) Is "Intrinsically Illogical."

Appellee recognizes the necessity for ascertaining the true intent of the parties to the 1928 agreement; but argues (Br. pp. 19-24) that the intention of the parties *must* have been to convey "talking" and "dialogue" rights (although no such grant appears in the contract), because, says appellee, such rights would be "wholly useless to them" (App. Br. p. 23), unless appellants also retained the motion picture rights.

This situation is variously referred to by appellee as "illogical" (App. Br. p. 19) and "intrinsically incredible" (Br. p. 23); and appellee concludes that the sum of

\$10,000 is too large a sum to pay for motion picture rights exclusive of dialogue. (Br. p. 24.) Here again argument is substituted for fact. The affidavit of Mr. Gallaher, which must be taken as true on this motion, states:

“ . . . \$10,000 was an inadequate and excessively small purchase price even for silent moving picture rights to a play produced successfully in New York City and was a price considerably lower than the amounts received by me from the sale of moving picture rights (excluding dialogue and talking rights) of other equally successful plays.” [Rec. pp. 34-5.]

In *L. C. Page & Co. v. Fox Film Corp.*, 83 Fed. (2d) 196, so strongly relied upon by appellee, the court recites the fact that on Dec. 1, 1923 Principal Pictures Corporation purchased the silent motion picture rights to the novel from L. C. Page & Co. for the sum of \$5,000. Expressly reserved by Page were the rights to “use in connection with said motion picture version any spoken words”, or “words produced by sound of any kind” (83 Fed. (2d) 198).

Appellee does not intimate such an express reservation *as early as the year 1923* was either “illogical” or “incredible”.

Furthermore, the facts in the *Page* decision show that in 1935 the “talking rights” were worth exactly *twice as much* as the motion picture rights; for in 1935 the Fox Film Corporation paid \$6,666.67 for the “motion picture rights” which were purchased from Principal Pictures Corporation, and paid \$13,333.33 for the “talking rights” to Mrs. Richard, the author. (See 83 Fed. (2d) 196, at p. 198, 2nd col.).

Appellee does not claim there was anything “illogical” or “incredible” about such a purchase of bare dialogue rights for \$13,333.33 from the author who had previously sold “all motion picture rights”. Nor does appellee see anything “illogical” or “incredible” in the fact that the plaintiff-publisher who had reserved the dialogue rights without any right whatsoever to make a motion picture either with or without dialogue should have commenced and successfully prosecuted an action predicated upon such publisher’s alleged ownership of the bare “talking rights”.

Even the *Page* case recognizes the distinction between “talking rights” and “ordinary” motion picture rights in the following apt language (83 Fed. (2d) 196 at p. 200) :

“An accounting . . . will be particularly complex here because the *infringement relates only to talking motion picture rights*. The apportionment of profits between ‘talking’ and ‘silent rights’ is sure to raise difficult and controverted questions.”

The true situation with respect to appellee’s “illogical” argument is that it ignores the custom, practice, and usage of the trade in the particular industry in question—a trade custom and usage having its origin as early as December of 1923 but which became universally known and practiced during 1927 and early in 1928 when the three kinds of motion pictures, (1) “silent”, (2) “sound”, and (3) “talking” each had their particular groups of producers and supporters. [See App. Op. Br. pp. 34-36 and Four Affidavits in Opposition to Motion, Rec. pp. 25, 30, 35, 77.]

It is not appellants who are tampering with express words but appellee who seeks to “expand the apparent scope of the grant”, by elaborate argument of phrases and explanation

of "internal evidences"; when the actual intention of the parties can only be "ascertained with greater certainty" by proof in open court of the particular trade usages and customs applicable at the time, in the particular industry, and in the particular place where the contract was made.

The "apparent scope" of the grant was and is solely of motion picture rights with sound effects and music. These rights cannot be expanded by appellee, without appellants' consent, to include "dialogue" or "talkie" rights which at the time the contract was made were universally recognized in the particular industry as distinct from the rights granted herein. (See Our Opening Brief, pp. 31, 37, incl.).

Regarding the restriction in the contract as to radio and other recording means, except in conjunction with the pictorial presentation of a photoplay, the reason for the restriction was to prevent any claim to radio and phonograph rights, which otherwise might be claimed from the grant of right to use devices for the recording and reproduction of sound. The restriction cannot expand the grant of moving picture rights to include spoken words or dialogue, or in infringement of the "dramatic rights" not mentioned. Such restriction is only important to expressly exclude radio and other recording means from rights expressly granted. Certainly appellee cannot use a restriction to enlarge a grant. If the restriction be ambiguous, it is appellee who prepared the contract and thereby is precluded from objecting to oral and other testimony necessary to explain the ambiguity and show the true intention of the parties. (See Appellants' Opening Brief pp. 33-34.)

It is quite evident that if it is necessary for appellee to make such an elaborate argument upon the "internal

evidence” of the contract in order to raise an inference of a grant not specifically made, then the contract certainly requires oral proof of the surrounding circumstances and of all of the relations of the parties and of the customs and usages of the trade in which the transfer is made, if the true intent of the parties is to be ascertained.

In this connection it should be remembered that although appellee’s predecessor in interest prepared the contract in question, the secretary and general counsel of that corporation was in such doubt as to what was actually included in the grant, that eight months after the contract was made he requested appellants’ former agent to give him “coverage” consisting of a written interpretation as to whether or not “talking rights” were covered by the contract as well as “ordinary motion picture rights.” [Rec. p. 61.]

Appellee considered this correspondence so important that its second moving ground for summary judgment in the lower court was that the contract had been interpreted by such former agent of appellants as granting “both talking and picture rights.” [Ground II, Rec. p. 63]; (see App. Op. Br. pp. 14-17, incl.)

Since appellee has chosen not to answer Point II of our opening brief (pp. 14-18, incl.) we assume appellee is now satisfied that appellants could not be bound by self-serving and hearsay declarations by their former agent eight months after his employment had been terminated. The documents attached to appellee’s moving papers [Exhibits A, B, C, Rec. pp. 60-61] are therefore not material except that they clearly show the contract was neither “plain” nor “unambiguous.”

If eleven years ago appellee's predecessor-in-interest doubted whether or not the contract covered "both talking" as well as "ordinary motion picture rights," we feel appellee itself has produced convincing proof that the "internal evidence of the contract" is anything but clear.

Certainly upon a motion for summary judgment the court is not at liberty to speculate as to the intentions of the parties nor as to any other facts which oral and other evidence taken in open court subject to cross-examination, might clarify. This is particularly true of evidence which bears on trade custom and trade usage alleged to be known to and intended by the parties to enter into their contract at the time it was made. (See our Opening Brief, pp. 19-28 and 31-37, incl.)

Appellee recites as another "internal indication of importance" the fact that the contract itself was executed not only by the authors but also by their production manager, the M. & G. Amusements, Inc., a New York corporation (Br. p. 21); and that the joinder of the "producing manager" in the grant must be because "*presumably* it had some interest in the legitimate stage rights in the play" (Br. p. 22); and that if mere motion picture rights were in contemplation that "the joining of such corporation as a grantor would not have been necessary." (Br. p. 22.) This entire argument is predicated upon the false assumption that a producing manager of a stage play in 1928 acquired no interest in moving picture rights.*

*In 1928 and for many years prior thereto, there was in existence a standard form of dramatic contract between authors and managers covering the production of virtually all plays in the United States and Canada; which contract was originated and standardized by the Dramatists' Guild of the Authors League of America, Inc. By the terms of this production contract, the producing manager acquired, by virtue of his production of a play, a percentage of the motion picture rights therein.

The only fair and just method of deciding the instant case is with all the facts actually and not presumably before the court—and this can only be done upon a trial which has thus far been denied to appellants.

REPLY TO APPELLEE'S POINT II.

Pleading and Proof of Trade Custom and Usage Admittedly Raises Genuine Tryable Issues of Fact Where the Contract Terms Are Not so Plain and Specific That as a Matter of Law Such Terms Could Not Have Reference to Trade Usage. Appellee's Claim of Prior Judicial Interpretation of Terms Used in the Instant Contract Is Wholly Without Merit.

Appellee attempts to avoid the compelling and controlling effect of the trade customs and usages pleaded by appellants by an argument which is in effect a repetition of the points previously made and answered. That is to say, appellee contends that trade custom and trade usage "cannot prevail against express language used in a written contract or when the language has received a judicial interpretation." (Br. p. 26.) The converse of this proposition is established by the cases cited in support of appellee's argument, to-wit, if there has been no prior judicial interpretation, and if the language of the contract is not plain, certain, express and unambiguous, evidence of trade custom and trade usage *is* admissible.

Quite aside from the fact that appellee cites no judicial construction or interpretation by any state court of New York at any time before or after the contract in question was executed, it is significant that appellee relies for its

“judicial interpretation” upon the single case of *L. C. Page v. Fox Film Corp.*, 83 Fed. (2d) 196, which was decided in 1936, *eight years after the execution of the contract here in question.*

A decision in 1936 could not have been in the contemplation of the parties who make a contract in 1928. The whole theory of the law is that parties may know and have in contemplation at the time of entering into an agreement, a *pre-existing* judicial construction of the terms used in such agreement.

This was the situation in the two cases cited by appellee which preclude interpretation of the language of a contract “contrary to *prior* judicial construction of language of like import,” to-wit, the cases of *Kerber Straw Hat Corp. v. Lincoln*, 239 App. Div. 727, 268 N. Y. S. 745, 747, and the case of *Heimerdinger v. Schnitzler*, 231 App. Div. 649, 248 N. Y. S. 597. It should be noted, however, that these cases expressly refer to “*prior*” judicial interpretation, and not to some *subsequent* decision.

The New York rule expressly set forth in *Miller v. Fischer supra*, is invariably to allow proof of trade usage and trade custom to explain the meaning of trade terms used in a contract unless such terms are so specific that it can be said as a matter of law that it could not have been made with reference to such custom or usage.

The New York cases cited by appellee are cases where the language of the contracts discussed were too specific to need explanation, and did not, as here, require definition. The case of *Richard v. Haebler*, 36 App. Div. 94, 55 N. Y. S. 583, excluded evidence to show a custom that the weight of barrels of cement shipped from a foreign port to New York was the “average” weight, which would

be less than the *specific* weight due to loss in transit. The court said, at page 588:

“This contract was made in New York, dated in New York, the cement to be delivered upon the dock at New York, and the barrels were to weigh 180 kilos at the point of delivery upon the dock at New York. The contract is specific and unambiguous.”

The dissenting opinion considered that the use of the term “kilo,” which is of a foreign measure of weight, permitted explanation of custom.

McIntosh v. Pendleton, 75 App. Div. 621, 78 N. Y. S. 152, involved an agreement alleged by one party to divide on “square halves,” and by “the other party that the vessel should be sailed by the month and not on halves.” Evidence was held inadmissible to show a custom to sell on halves. The dispute was as to the specific terms adopted, and not the meaning of those terms.

Transatlantic Shipping Co. v. St. Paul Fire and Marine Ins. Co. (2 Cir.), 9 Fed. (2d) 720, involved the express terms of a policy of insurance which provided that the goods were to be carried “under deck.” It was held inadmissible to prove a custom to carry “above deck.”

The cases cited by us in our opening brief are cases where the terms were not so specific as to preclude proof of custom governing: *e. g.*, “Yards” of plastering, for the purpose of computing the price to be paid, included the openings not plastered (p. 19); orders for encyclopedia construed to mean orders where a certain number had been paid for (p. 20); quality of hemp construed as measure of value allowing inferior hemp at a price to be agreed upon or arbitrated (p. 21); “thousand” construed to mean 1200; “a week” construed to mean during the theatrical season; a “day” to mean a working day; freight

on delivery at a certain rate per pound to allow discount established by custom. (Br. p. 23.) Additional illustrations are shown in 27 R. C. L., page 171, and 89 A. L. R. 1228. (See particularly our Opening Brief, pp. 19-28, incl.)

The controversial terms in the grant herein are “motion picture” rights and the use of “sound” and music in conjunction therewith. [Rec. p. 14.]

Literally and specifically the term “motion picture” means a *picture*, and not a dialogue—which is auditory. It is evident, also, that the right to use “sound” in conjunction with motion pictures is general, and not specific.

We do not speak of “sounds” of an opera, but of its “words and music,” or of the songs or lyrics used in it. We do not speak of “sounds” of a dramatic composition, but of its dialogue or speech. But we do speak of “sound effects” which are used with motion pictures, and on the phonograph and radio.

Appellee does not rely upon a contention that “dialogue” and “talking” rights are specifically granted by the contract here in question but relies upon “ample internal evidence precluding a claim of ambiguity or uncertainty.” (App. Br. p. 27.) We have heretofore discussed this “ample internal evidence (*supra*, Point I-B, pp. 9-15). No so-called “internal evidence” can expand the grant to include that which is not specifically stated.

Certainly a contract is not so specific as to exclude trade custom or trade usage when it requires appellee’s elaborate argument of internal evidence in order to attempt to find the meaning of a general term.

Apparently recognizing that there has been “no prior judicial construction” in the courts of New York State or

elsewhere which supports appellee's claim, and also apparently realizing that the language of the contract is neither specific, definite, certain, plain or unambiguous as to the grant of "talking" or "dialogue" rights, appellee finally falls back upon the argument that the trade custom and trade usage pleaded by appellants is "unreasonable." (Br. p. 32.)

The test of the existence and applicability of the particular trade customs and usages pleaded in this case is not what ordinary persons or lawyers might think are "logical" or "reasonable" customs. Trade customs and trade usages rarely are based upon ordinary lay logic or technical legal reasoning.

The record in this case plainly shows that at the time the contract was executed in April of 1928 appellee itself distinguished between "sound" and "talk," between "sound pictures" and "talking pictures." [Rec. p. 78.] As late as the fall of 1928 the *combination* of "sound" with "dialogue" was regarded as an "innovation." [Rec. p. 79.] The very books discussing the development of "talking" motion pictures which are cited by appellee in their moving affidavits, expose the fallacy of appellee's contention that in April of 1928 "sound" included "speech." [See Rec. pp. 77-80.]

This case must be determined upon the facts as they existed in April of 1928. Those facts involve a complete consideration of all of the surrounding circumstances—including then established trade customs and trade usages—which entered into the contemplation of the parties and became an integral and essential part of the contract. (See *Walls v. Bailey*, 49 N. Y. 464, and App. Op. Br. pp. 19-28 incl.)

The affidavits in opposition to the motion for summary judgment [R. pp. 77-81] are supported by reference to acknowledged histories of the art (some of which were cited in appellee's moving affidavits); which histories or oral testimony of the facts recited would have been competent evidence if a trial had been had on the merits instead of on arguments. (Rules 43 and 77 of the Rules of Civil Procedure.)

Conclusion.

The lower court reached an erroneous conclusion as to the meaning of the contract, because the case was tried upon conflicting affidavits which were weighed as though they were the oral statements of witnesses in open court; and totally excluded from consideration were the trade usages and customs existing at the time and place of the contract, as set out in the pleadings and supported by the affidavits of appellants.

We are not seeking a reversal on the merits, but a reversal so that the merits may be properly shown. A motion for summary judgment was not devised so as to arbitrarily and summarily dispose of genuine, tryable issues upon which litigants are entitled to have their full day in court.

Respectfully submitted,

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